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Proceeding by the Department on its own Motion to)	
Implement the Requirements of the Federal)	
Communications Commission's Triennial Review)	D.T.E. 03-59
Order Regarding Switching for Large Business)	
Customers Served by High-Capacity Loops)	
)	

Verizon Massachusetts (“Verizon MA”) moves for an opportunity to file a response to the joint “Offer of Proof” filed on October 15, 2003, by DSCI Corporation and InfoHighway Communications. As grounds for its motion, Verizon MA states as follows.

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Report and Order, and Order on Remand and Further Notice of Proposed Rulemaking (rel. August 21, 2003).

by specific facts, applied to economic and operational standards dictated by the FCC. *Id.*, 455. These standards are the same ones that the FCC already applied when it made its finding of no impairment. Any waiver request – which can come only from a state commission – must be filed with the FCC within 90 days from the October 2, 2003, effective date of the *Triennial Review Order*, i.e., no later than December 31, 2003.

The Department opened this proceeding to consider “the applicability in Massachusetts of the FCC’s finding that switching for business customers served by high-capacity loops should no longer be unbundled and ... whether the Department should petition the FCC for a waiver of its finding.”² To determine whether it should even proceed to investigate impairment issues for the enterprise switching market, the Department required CLECs to make an offer of proof as to their claims.³ DSCI and InfoHighway’s joint filing of October 15th was the only offer of proof made by CLECs in Massachusetts.⁴

² *Vote and Order Opening Proceeding* at 2.

³ Since the FCC found no impairment in the enterprise switching market, Verizon MA has no burden at the state level to support the FCC’s determination. Rather, exclusive authority to request a waiver — and the exclusive responsibility to decide whether a waiver should be requested — lies with the Department (just as the exclusive authority to decide whether a waiver should be granted lies with the FCC). Hence, the Department would have to assemble sufficient facts to rebut the FCC’s non-impairment finding.

⁴ DSCI and InfoHighway state that they made the filing under protest because the Second Circuit had issued a stay of the 90-day proceedings on October 8, 2003. *See* Offer of Proof at 1, fn 1. The significance they appear to place in the Second Circuit’s action is misplaced because that court’s administrative stay was entered erroneously. All appeals of the *Triennial Review Order* were assigned to the United States Court of Appeals for the Eighth Circuit by the Multi-District Litigation panel on September 16, 2003. The Eighth Circuit subsequently transferred the cases to the D.C. Appeals Circuit on September 30 and on October 1 the cases were consolidated in the United States Court of Appeals for the D.C. Circuit. On October 3, the D.C. Circuit issued an order requiring all relevant cases to be transferred to it by the courts in which they were filed and included a list of courts with pending cases with that order. Meanwhile, a motion for stay and transfer of the enterprise switching portions of the *Triennial Review Order* was filed at the Second Circuit on September 30 by InfoHighway and another CLEC. This case was apparently inadvertently omitted from the list of cases that the D.C. Circuit asked to have transferred to it and, as a result, the Second Circuit did not

Since the only issue now before the Department is whether it should proceed with an investigation, Verizon MA should be allowed to comment on the DSCI/InfoHighway filing. Those comments will assist the Department in making its determination because Verizon MA will show that the DSCI/InfoHighway offer fails on its face to address *any* of the factors the FCC's *Triennial Review Order* and rules identify as being necessary to support a waiver petition sufficient to rebut the national finding of no impairment in the enterprise switching market. Moreover, the DSCI/InfoHighway filing contains various legal conclusions regarding the Department's prerogatives under the *Triennial Review Order* that are erroneous and conflict with the FCC's findings. The Department should not determine whether further investigation is warranted without permitting Verizon MA to describe the multiple significant flaws in the DSCI/InfoHighway offer of proof, which would have the Department address "facts" that are irrelevant to the issues the FCC has determined must be addressed by a state commission in a waiver petition.

automatically transfer it to the D.C. Circuit. Instead, the clerk's office in the Second Circuit issued a temporary administrative stay on October 8, pending a hearing on the stay and transfer motion by a panel of judges at the Second Circuit. Thus, a temporary stay was issued by a court that, post-consolidation, does not have jurisdiction over the case. It is likely that this procedural irregularity will be promptly addressed. In any case, the Second Circuit stay is purely administrative in nature and is not a reflection of any judicial panel's views on the merits of the case.

In response to the October 9, 2003, letter of DSCI/InfoHighway on the effect of the Second Circuit's actions, the Department held: "The Department concludes that nothing in the temporary stay orders or in the underlying motions for stay indicate that the court has stayed the 90-day investigation in D.T.E. 03-59. Further, it is imprudent to stay this proceeding based only on the possibility that the provisions of the Triennial Review Order may be modified, given the short deadline under the current rules." *Procedural Memorandum* dated October 14, 2003, D.T.E. 03-59.

Verizon MA appreciates the fact that the FCC has imposed a very short period for state commissions to file waiver petitions for enterprise switching. Accordingly, if this motion is granted, Verizon MA will file its responsive comments within five business days following that ruling.⁵

WHEREFORE, Verizon MA respectfully requests that the Department give Verizon MA an opportunity to file responsive comments by granting this motion.

Respectfully submitted,

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⁵ If this motion is denied and the Department decides to conduct a further inquiry, it should hold a procedural conference to set a schedule for the case.